DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0351 RO Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes For The Period: 1990 through 1997

NOTICE:

Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Responsible Officer Liability: Duty to Remit Gross Retail Tax and Withholding Tax

<u>Authority</u>: IC 6-3-4-8, <u>Indiana Department of Revenue v. Safayan</u>, 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for gross retail taxes and withholding taxes not paid during the assessment period.

STATEMENT OF FACTS

Taxpayer was the president of a business incorporated in Indiana in 1986 which was part of a merger in 1993 (hereinafter corporation "P").

Additional facts will be provided as necessary.

DISCUSSION

IC 6-3-4-8(f) states in part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana....

In order to determine which persons are personally liable for the payment of these "trust" taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. <u>Indiana Department of Revenue v. Safayan</u>, 654 N.E.2d 270, 273 (Ind. 1995), is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid.

The Indiana Supreme Court in Safayan identified three relevant factors:

- (1) the person's position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

During the period in which taxpayer was the President for organization liable for remitting withholding tax, taxpayer was a responsible officer who had the duty to remit taxes to the Department. Taxpayer concedes that he was acting president from during the years 1990 to September 3, 1993. Taxpayer states that he relinquished effective control over P on September 3, 1993. Taxpayer provides an amended disclosure statement filed in US Bankruptcy Court as evidence that he was no longer considered an officer or director as August 24, 1994.

However, despite taxpayer's contentions that he was no longer a responsible officer of P, taxpayer signed the annual reports for P in 1993, 1994, and 1995. From the information available and information provided by taxpayer, there is no rebuttal to the presumption that taxpayer remained a responsible officer, as President of P, through April of 1996.

In April of 1996, the annual report of P changed the President to another individual which rebuts the presumption that taxpayer was still a responsible officer. Therefore, the information available indicates that taxpayer was a responsible officer for all the unpaid taxes of P until April of 1996.

FINDING

The taxpayer's protest is partially denied and partially sustained. Taxpayer was a responsible officer with a duty to remit taxes on P from 1990 to April of 1996. Taxpayer was not a responsible officer with a duty to remit taxes for P after April of 1996.